No. 481189

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DARIAN LIVINGSTON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE HELEN WHITENER

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when it entered Finding of Fact 11: "After defendant had been identified and the DOC warrant confirmed and after defendant was arrested on the DOC warrant and made statements that he drove the vehicle, DOC Officer Grabski conducted a compliance search of the vehicle. Officer Boyd assisted with the search." (CP113; Findings and Conclusions on Motion to Suppress CrR 3.6).

B. The trial court erred when it entered Conclusion of Law 7: "…Since Officer Grabski had reasonable cause to believe a violation had occurred, consent by the offender for the search of the vehicle was not required." (CP 115: Findings and Conclusions on Motion to Suppress CrR 3.6).

C. The trial court erred when it entered Conclusion of Law 9: "Under RCW 9.94A.631, if there is reasonable cause to believe that an offender has violated a condition of requirement of his or her sentence, a community corrections officer may require that offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property. Since there was reasonable cause in this case to believe that defendant had violated a

condition or requirement of his sentence, the search of the vehicle by Officer Grabski and assisted by Officer Boyd was a valid search. Based on the evidence presented to the court, this was a true probationary search and not an investigatory search." (CP 116: Findings and Conclusions on Motion to Suppress CrR 3.6).

D. The trial court erred when it entered Conclusion of Law 11: Defendant's motion to suppress is therefore denied. (CP 116: Findings and Conclusions on Motion to Suppress CrR 3.6).

E. The trial court erred when it entered Conclusion of Law 3: "That Defendant, Darian Livingston, is guilty beyond a reasonable doubt of the crimes of unlawful possession of a firearm in the first degree (Count I), unlawful possession of a controlled substance- Cocaine (Count II); Bail Jumping (Count III); unlawful possession of a controlled substance – Oxycodone (Count IV) and unlawful possession of a controlled substance – Hydrocodone (Count V). (CP 107: Findings and Conclusions of Law RE: Bench Trial.)

F. The trial court erred when it entered Conclusion of Law 8:

"In order to establish the defense of uncontrollable circumstances, the defendant must prove that uncontrollable circumstances, defined as an act of nature or a medical condition that requires immediate hospitalization or treatment or an act of man such as an automobile accident or threats of death occurred. The defendant must also prove by a preponderance of the evidence that he did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear. Defendant has failed to meet this burden." (CP 108; Findings of fact and Conclusions of law re: Bench Trial).

G. The trial court erred when it entered Conclusion of Law 9: "Defendant has not shown that his incarceration in the SCORE jail for violating his conditions of DOC supervision meets the definition of uncontrollable circumstances. The probation violation which resulted in defendant's incarceration was not an act of God. Defendant's own actions resulted in the probation violation which caused him to be incarcerated and thus fail to personally appear in court." (CP 108; Findings of fact and Conclusions of law re: Bench Trial).

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment, Const. art. 1,§7, and RCW authorize searches in particular circumstances. Under 9.94A.631 are community corrections officers authorized to conduct a warrantless search of a parolee's vehicle absent a reasonable suspicion that a search would yield evidence related to a known parole violation, failure to appear?
2. Under RCW 9A.76.170(2) it is an affirmative defense to the prosecution for bail jumping, that uncontrollable circumstances prevented the person from appearing, the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear, and the person appeared as soon as such circumstances ceased to exist. Has the defendant met the burden, excusing his conduct, where he has shown he was in a SCORE jail, and did not contribute to the creation of the circumstances in reckless disregard of the requirement to appear, and appeared the first day after he was released?

II. STATEMENT OF FACTS

The Pierce County Prosecutor's office charged Darian Livingston by amended information with unlawful possession of a firearm, first degree; unlawful possession of a controlled substance, cocaine, Hydrocodone, Oxycodone, and bail jumping. CP 34. Mr. Livingston waived a jury trial and proceeded to a CrR 3.5 and 3.6 hearing. (CP 65; RP 51-148).

The undisputed facts are as follows:

On May 29, 2014, between 10:30 and 10:45 pm, CCO Grabski saw Mr. Livingston washing a car at a car wash facility. (RP 53). He recognized him, but did not know Mr. Livingston's name. He believed there was a DOC warrant for him. (RP 54). He called for Tacoma police to make contact with Mr. Livingston. (RP 55). When Officers Boyd and Young arrived, they saw Mr. Livingston talking with an individual on a motorcycle. The motorcyclist drove away as officers approached the car wash bay. (CP 112).

Officers made a social contact with Mr. Livingston. Mr. Livingston did not want to give his name, but stopped walking away when Officer Young told him he had a DOC warrant. (CP 112). Officers confirmed his identity and an active arrest warrant for a

failure to report. (RP 58; 228-29). They placed him under arrest and searched him. (RP 90; 228-29). At the time he was arrested and searched, there was no evidence of any other parole violation or crime. (RP 109).

Mr. Livingston initially told officers the car he had been washing belonged to his girlfriend and that she had walked to the store. (RP 92). He later relented and told them the car belonged to a friend and he and his girlfriend used it. (RP 93). Officers determined the car was registered to Debbie Guptill, but never spoke with her or obtained her permission to search the car. (RP 105-106).

After Mr. Livingston was securely in the patrol car, CCO Grabski searched the car to look for evidence of further violations of probation. (RP 60; 71-72). Mr. Livingston did not give his consent for the car search. (RP 73).

Inside the car, Grabski located Oxycodone and Hydrocodone pills, as well as paperwork with Mr. Livingston's name on it. In the car trunk he found a backpack. He searched the backpack and discovered a firearm and ammunition, along with Mr. Livingston's business inventory of scents and oils. (RP 96). Prior

to entering the jail, Mr. Livingston told the officer that he had cocaine in a baggie inside his pants. (RP 236).

The defense moved to suppress the evidence. After reviewing the relevant legal authority, the court reasoned that RCW 9.94A.716 addresses community custody violations and authorizes arrests for violations. (RP 149). The court stated that RCW 9.94A.631 provides that a probationer has a diminished expectation of privacy:

> "If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant pending a determination by the court of the Department. If there is a reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile or other personal property."

(RP 152).

The court went on:

> "According to RCW 9.94A.631, once that warrant is confirmed, the correctional officer does have the reasonable cause to believe that there is a violation of the conditions and may require the offender to submit to a search. It's not mandated, but may require.

> My research of case law does not indicate there has to be consent or assent by the offender for that search. It is part of the reduced expectation of privacy that goes along with being on probation, and it affords the correctional officer to search not only the offender's person, the offender's residence, the offender's automobile, or other personal property. "

(RP 153).

The court concluded the search was a valid search and denied the defense motion to suppress the evidence. (RP 153; CP 115-116). The court stated:

> This is after looking at the totality of the circumstances in this case. The reasoning is it appears from the testimony elicited that this was a true probation search versus an investigation search, which would have been more focused on finding evidence of a crime versus a compliance check.

(RP 154-55).

Mr. Livingston posted bond and was released on July 3, 2014. On July 29, 2014, he signed a Scheduling Order, which set an Omnibus hearing for August 25, 2014. (CP 15). The document ordered him to be present at the hearing and failure to appear would result in a warrant being issued for his arrest. (CP 104).

Beginning August 6, 2014, he was confined at the SCORE jail on a 20-day sanction for a community custody violation, failure to report. (CP 105). Although he was sanctioned only 20 days, he was not released until the 21st day (August 26), which caused him to miss his court date. (RP 396). The court authorized issuance of a bench warrant. (CP 18). The day after his release, August 27, 2014, Mr. Livingston was at a Scheduling Order hearing. (CP 20). On September 4, 2014, the bench warrant was quashed. (CP 22). At trial, Mr. Livingston explained that he did not attend court on August 25 because SCORE does not transfer individuals back and forth to Pierce County for court appearances. (RP 395).

Mr. Livingston was convicted on all counts and the court imposed a DOSA. (CP 80-97). Mr. Livingston appeals. (CP 118).

III. ARGUMENT

A. Under The Protections of The Fourth Amendment And Washington Constitution Article I, § 7, The Search and Seizure Authorized By RCW 9.94A.631(1) Must Relate To The Violation Which The Community Corrections Officer Believes To Have Occurred.

A trial court's conclusions of law are reviewed *de novo.* *State v. Acrey,* 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The

appellate court reviews conclusions of law from an order pertaining to the suppression of evidence *de novo. State v. Duncan,* 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

The Fourth Amendment protects against unreasonable searches. U.S. Const. amend.IV. Even with a warrant based on probable cause, or an exception to the warrant requirement, the scope and manner of the search is limited: it must be reasonable, "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court,* 387 U.S. 523, 536-37, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

For example, under *Gant,* the United States Supreme Court held that an auto search incident to arrest exception to the Fourth Amendment's warrant requirement applies only when an arrestee is unsecured and within reaching distance of the passenger compartment *at the time of the search* and when it *is reasonable to believe evidence relevant to the crime of arrest might be found in the car. Arizona v. Gant,* 556 U.S. 332, 12 S.Ct. 1710, 173 L.Ed.2d 485 (2009). (Emphasis added).

The Washington State Constitution article 1 § 7 provides even broader protection: No person shall be disturbed in his private affairs, or his home invaded, without authority of law. *State v*

Snapp, 174 Wn.2d 177, 182, 275 P.3d 289 (2012). In *Snapp* the Washington Supreme Court reiterated its earlier holding that an exception to the warrant applies only where there is "a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of *the crime of arrest* that could be concealed or destroyed and that these concerns exist at the time of the search." *Snapp,* 174 Wn.2 at 189 (quoting *State v. Patton,* 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009); *State v Buelna Valdez,* 167 Wn.2d 761,777, 224 P.3d 751 (2009)("after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception."). Unlike federal law, there is no "automobile exception" recognized under article I, § 7. *Id.* at 192. Here, Mr. Livingston was arrested, handcuffed, and placed in the back of the patrol car before CCO Grabski began his search. There was no justification for a warrantless search of the vehicle.

Washington law provides that probationers and parolees have a "diminished right of privacy that permits a warrantless search based on probable cause." *State v. Jardinez,* 184 Wn.App.

518, 523, 338 P.3d 292 (2014). A community corrections officer is authorized by statute to conduct a warrantless search of an offender's personal property *provided the officer has a reasonable suspicion. State v. Patterson,* 51 Wn.App. 202, 208, 752 P.2d 945 (1988). RCW 9.94A.631(1) provides:

> "If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property."

In *Jardinez,* the Court reviewed whether a CCO has essentially unfettered legal authority to search a probationer, his home, his vehicle, and property absent an expectation the search will yield evidence of the *known* parole violations. *Jardinez,* 184 Wn.App. at 523. (Emphasis added).

There, the defendant had previously been convicted of a drive by shooting and unlawful possession of a firearm. *Id.* at 520. Under the conditions of community custody, he was to refrain from

possession or consumption of controlled substances without a prescription and to report to his CCO. *Id.* Like Mr. Livingston, Jardinez failed to report to his CCO. Two weeks later, Jardinez showed up for his appointment and admitted a UA would indicate marijuana use. *Id.* The CCO directed him to empty his pockets and noticed he had an IPOD. The CCO searched the IPOD and found a video showing Jardinez pumping a shotgun. After Jardinez's arrest, officers searched his home and found the shotgun. *Id.* at 521.

Similar to Mr. Livingston, at trial, the defendant moved to suppress the evidence obtained through the search of the IPOD and all evidence seized as a result of law enforcement searching his home, as fruit of the poisonous tree. *Id.* at 522. The State's position was that if an offender on community custody failed to meet with his assigned officer, that officer may search the offender, "the offender's home, automobile or other personal property, since the officer has reasonable suspicion the probationer violated the terms of his community custody. The State argued any parole violation justifies any search for any other violation. *Id.* at 525. This interpretation implied property other than property with a nexus to any criminal activity. *Id.* The trial court suppressed the

evidence, explicitly ruling that there must be "a reasonable nexus between the suspected criminal activity and the search. " *Id.*

On review, the Court held that "[u]nless an exception is present, a warrantless search is impermissible under both article I § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution." *Id.* at 523. While Washington law recognizes that probationers have diminished privacy rights, that expectation of privacy is constitutionally permissible *only to the extent necessitated by the legitimate demands of the operation of the parole process*. *Id.; State v. Parris,* 163 Wn.App. 110, 118, 259 P.3d 331 (2011): *State v. Simms,* 10 Wn.App. 75, 86, 516 P.2d 1088 (1973).

The Court went on to reason that

> "We cannot discern "plain meaning" in RCW 9.94A.631(1) for purposes of addressing the scope of any search. The language could be read to allow an unlimited scope of the search. The statute could be read to limit the search to areas or property about which the community corrections officer has reasonable cause will provide incriminating evidence."

Id. at 526.

The *Jardinez* Court looked to the Sentencing Guidelines Commission comment about RCW 9.94A.631(1) :

> "The search and seizure authorized by this section should relate to the violation which the Community Corrections Officer believes to have occurred."

Jardinez, 184 Wn.App. at 529. (quoting DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT of 1981). The Court determined the statute demanded a nexus between the searched property and the alleged crime. *Id.* The Court concluded that RCW 9.94A.631 did not authorize the warrantless search of Jardinez's IPOD and affirmed the trial court's suppression of evidence of unlawful possession of a firearm.

Here, the CCO stated they were searching for "Further violations of probation." (RP 60). The trial court framed the issue[1] that CCO Grabski was merely doing a "compliance check" or probationary search rather than an "investigatory search."[2] A probation search exception to the warrant requirement requires the officer to have reasonable cause to believe an offender has violated

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[1] Finding of Fact 11: CP 113.
[2] Conclusion of Law 9: CP 116

a condition of sentence. The State constitution does not authorize an unfettered search of a parolee's person and property; there must be a nexus between the searched property and the alleged crime. *Jardinez,* 184 Wn.App. at 525,529. To allow officers to conduct searches absent the requisite nexus by relabeling their actions as a "compliance check" is to undermine the constitutional, statutory, and case law limitations on the scope of the warrantless probation search. That is exactly what occurred here: the CCO stated he was searching for evidence of other violations. A parole violation does not justify any search for any other violation. *Jardinez,* 184 Wn.App. at 525.

The record shows that officers detained Mr. Livingston because he was wanted for failure to report and there was a warrant for his arrest. There is no claim that evidence of the violation of failure to report was to be found in his vehicle. The search was unlawful and the trial court erred when it denied Mr. Livingston's motion to suppress the evidence derived from the unlawful search.

Mr. Livingston respectfully asks this Court to reverse and dismiss with prejudice his convictions for unlawful possession of a firearm, and unlawful possession of controlled substances.

B. Mr. Livingston Is Not Guilty Of Bail Jumping Because Uncontrollable Circumstances Prevented Him From Appearing And He Appeared In Court The Following Day.

Generally, an affirmative defense does not negate an element of a charged offense; rather, it excuses the defendant's otherwise unlawful conduct. *State v. Dow,* 162 Wn.App. 324, 331, 253 P.3d 476 (2011). In a prosecution for bail jumping, it is an affirmative defense that (1) uncontrollable circumstances prevented the person from appearing; (2) the person did not contribute to the creation of such circumstances in *reckless disregard* of the requirement to appear; and (3) the person appeared as soon as such circumstances ceased to exist. RCW 9A.76.170(2) (emphasis added). A defendant must establish each element of the affirmative defense by a preponderance of the evidence. *State v. Jeffrey,* 77 Wn.App. 222, 225, 889 P.2d 956 (1995); *State v. Harvill,* 132 Wn.2d 248, 258-60, 937 P.2d 1052 (1997).

a. Uncontrollable Circumstances

RCW 9A.76.010(4) provides:

> "Uncontrollable circumstances" means an act of nature such as a flood, earthquake, or ire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of

> death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts."

The statutory definition is not exclusive, but rather, gives guidance as to the type of barriers that are deemed uncontrollable. They are simply events, circumstances, and situations over which the individual has no control.

Here, Mr. Livingston argues, and this appears to be an issue of first impression, that being in custody of the State as an inmate, amounts to an uncontrollable circumstance[3]. The record demonstrates that Mr. Livingston was confined at the SCORE jail. He was to serve through August 25th, his appointed court date. He testified the SCORE facility did not transport inmates over to the

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[3] In *State v. O'Brien,* 164 Wn.App. 924, 267 P.3d 422 (2011), the defendant failed to pay his legal financial obligations and the court ordered him to serve jail time. *Id.* at 927. He failed to report on the first day because he was incarcerated on another matter. The State charged him with bail jumping. At trial, the State established that O'Brien did not surrender as soon as he was released from custody, that is, as soon as the circumstances ceased to exist. *Id.* On review, the Court reasoned that it did not need to reach the question of whether incarceration was an uncontrollable circumstance, because it was clear that O'Brien had not surrendered at the first opportunity. *Id.* at 932.

Pierce County Jail. He was instead brought to the CJC and not released until August 26th, one day after his hearing. Mr. Livingston literally had no control or option to arrange for himself to be present in court on August 25th.

b. Mr. Livingston did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear.

Mr. Livingston was confined at SCORE because of a failure to report to his CCO. Even if, as the trial court concluded, Mr. Livingston had some contribution to his circumstance of confinement, it was not in reckless disregard of the requirement to appear. He had every reason to believe that he would be released in time to attend the scheduled hearing.

c. Mr. Livingston appeared as soon as the circumstance ceased to exist.

The record shows that Mr. Livingston was released on August 26. The following day, he appeared for the scheduling order hearing.

The trial court erred when it found that Mr. Livingston had not proved by a preponderance of the evidence the affirmative defense of uncontrollable circumstances. His conviction for bail jumping should be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Livingston respectfully asks this Court to reverse and dismiss with prejudice his convictions.

Respectfully submitted this 21st day of March, 2016.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on March 21, 2016, I mailed by USPS, first class, postage prepaid, or served by electronic service by prior agreement between the parties, a true and correct copy of the Brief of Appellant to the following:

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